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LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents, Petitioners, v. CATALINA FOOTHILLS SCHOOL DISTRICT, Respondent.

No. 92-94

SUPREME COURT OF THE UNITED STATES

1992 U.S. Briefs 94; 1992 U.S. S. Ct. Briefs LEXIS 749

October Term, 1992

November 19, 1992

[*1]

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DEAF COMMUNITY CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause bars a public agency from providing sign language interpreter services under the Education for the Handicapped Act (EHA) to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

View Table of Authorities

INTERESTS: INTEREST OF AMICUS CURIAE *

* Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37.

The Deaf Community Center is a nonprofit 501(c)(3) organization incorporated in Kentucky, with its principal office located at 2422 West Chestnut, Louisville, Kentucky. Mr. Tim Owens is the Executive Director. The Deaf Community Center serves the deaf population in Kentucky and Indiana. The Deaf Community Center works closely with vocational rehabilitation, and focuses upon finding solutions to problems encountered in family situations where one or more family members are deaf. It provides advice, training and support to individuals in communities to help them with educational programs for deaf students. The Deaf Community Center encourages the training of leaders in the community in the methods and skills necessary to communicate and work with deaf and hearing impaired persons in all walks of life. Given the purposes set out above, Deaf Community Center believes that its view of the relevant law will assist the Court in its evaluation of this case.

TITLE: BRIEF OF DEAF COMMUNITY CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

Petitioners, Larry and Sandra Zobrest, requested the Respondent Catalina Foothills School District, pursuant to the provisions of the Education of the Handicapped Act ("EHA"), *20 U.S.C. § 1400*, et seq., and its Arizona statutory corollary, Ariz. Rev. Stat. §§ 15-761, et seq., to provide the assistance of a certified language interpreter for their hearing impaired son, James Zobrest. That assistance was denied by the School District on the grounds that providing an interpreter to a student attending a private, parochial school would violate the First Amendment.

The United States District Court for the District of Arizona n1 and the United States Court of Appeals for the Ninth Circuit n2 agreed that funding an interpreter for the deaf at a parochial school would violate the Establishment Clause. The ninth circuit held that this funding did not pass muster under the tri-partite test set forth in *Lemon v. Kurtzman, 403 U.S. 602 (1971).* Amicus urges this Court to reverse the decision of the court [*4] below and hold that EHA funding may constitutionally be given for sign language interpreters in parochial schools.

n1 441 EHLR 564 (D. Ariz. 1989) (unreported opinion).

n2 *1992 W.L. 86206* (9th Cir. (Ariz.)). Attached in its entirety to the Petition for Certiorari at A1.

Through EHA, the federal government established a program to provide educational assistance for a wide variety of secular purposes. The incidental benefit accruing to a parochial school when a sign language interpreter is provided to an EHA beneficiary is de minimus, particularly when compared to the benefits conferred throughout the program. This Court's precedents in analogous situations show that such incidental benefits conferred on a religious organization through a facially neutral federal program do not violate the Establishment Clause.

In addition, this Court has held that a facially neutral government subsidy given to a broad spectrum of secular groups which also incidentally benefits a religious organization does not run afoul of the First Amendment. A family's decision to use neutrally available government aid to assist in the education of their handicapped child, through the [*5] mechanical service of sign interpretation, does not create an impermissible union of church and state. James Zobrest should not be denied access to an education simply because a few of the classes interpreted for him are religious. Therefore, the Amicus urges this Court to reverse and remand the decision of the ninth circuit.

I. FUNDING AN INTERPRETER FOR A HEARING IMPAIRED STUDENT AT HIS PAROCHIAL SCHOOL FULFILLS ALL OF THE LEMON TEST REQUIREMENTS AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court uses a three-prong test to assess alleged violations of the Establishment Clause. *Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971); Harris v. McRae, 448 U.S. 297 (1980).* As stated in Harris:

It is well settled that a legislative enactment does not contravene the Establishment Clause if it has: [1]. a secular legislative purpose; [2]. if its principal or primary effect neither advances nor inhibits religion; [3] if it does not foster an excessive government entanglement with religion.

448 U.S. at 319. Accord, Bowen v. Kendrick, 487 U.S.589, 602 (1988). Funding James Zobrest's interpreter in his parochial school fulfills all [*6] of the requisites of the Lemon test and does not violate the Establishment Clause. The primary secular purpose of such funding is to promote education for the handicapped, and such facially neutral funding does not represent excessive entanglement but instead grants a benefit to the community as a whole. n3

n3 In finding tax exemptions for religious organizations constitutional, Justice Brennan said in this regard:

> these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community.

Walz v. Tax Commission, 397 U.S. 664, 687 (1970) (Brennan, J., concurring).

A. The Exclusive or Predominant Purpose of the EHA Is to Provide Handicapped Students With an Education, Not To Foster a Particular Religious Belief, Thus Fulfilling the First Requirement of the Lemon Test

The first requisite of the Lemon Test is that the challenged legislation have a secular purpose. The EHA's secular purpose is provision of education [*7] for the handicapped. The impetus for the EHA was not any sort of religious consideration. Accordingly, the funding in the instant case fulfills the first criteria of Lemon.

The act of interpreting for the hearing impaired is itself secular. The provision of this interpretation service to handicapped students serves purposes which are predominantly secular. This Court has stated that the legislative purpose requirement is violated only when the governmental activity was motivated wholly by religious considerations:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it was concluded that there was no question that the statute or activity was motivated wholly by religious considerations. Even where the benefits to religion were substantial . . . we saw a secular purpose and no conflict with the Establishment Clause.

Wallace v. Jaffree, 472 U.S. 38 (1985) (footnote omitted), reiterated that the purpose requirement is violated only if a law "is entirely motivated by a purpose to advance religion," and is not violated if "motivated in part by a religious purpose." *472 U.S. at 55.* [*8] This Court has also stressed a "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose" appears on "the face of the statute." Id. (emphasis added).

Thus, the primary secular purpose of the EHA -- providing an education to deaf children -- fulfills the Lemon requirement of a secular legislative purpose. Such a secular purpose does not evince a religious purpose. The incidental benefit which may flow to religion cannot invalidate the practice under the Establishment Clause.

The Respondents focus solely upon the religious (rather than the scholastic) context of this case. As this Court previously has pointed out, however, such a myopic vision of activities incidentally benefitting religion would constitutionally invalidate all activities which even remotely relate to religion. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly, 465 U.S. 668, 680 (1985).*

An absolute separation of government benefits from religious organizations under the rubric of separation between church and state has never been required. [*9] "[A] hermetic separation of the two is an impossibility . . . [that] has never been required." *Roemer v. Bd. of Pub. Works, 426 U.S. 736, 746 (1976).* As this Court stated in Lemon:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense . . . [The] line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

Lemon, 403 U.S. at 614. n4

n4 See also *Wolman v. Walter, 433 U.S. 229, 263 (1977)* ("Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism") (Powell, J., concurring and dissenting); *Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980)* ("Our decisions have tended to avoid categorical imperative and absolutist approaches at either end of the range of possible outcomes").

Instead, this "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment [*10] Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla, 480 U.S. 136, 144-45 (1987).*

B. The Primary Effect of EHA Funding Is to Promote Education for Handicapped Students, Not Promote a Particular Religion, Thus Fulfilling the Second Requirement of the Lemon Test

The second requisite of the Lemon test is that the legislation at issue does not have the principal or primary effect of advancing or inhibiting religion. The primary effect of the EHA is to assist handicapped students, not to advance religion. Thus, funding a sign language interpreter through the EHA satisfies the second criterion of Lemon.

Many decisions of this Court involving analogous governmental activities lend support to the constitutionality of the practice of providing interpreters to the hearing impaired in parochial schools. Those decisions were summarized in Lynch v. Donnelly, as follows:

But to conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than

expenditure of large sums of money for textbooks supplied throughout [*11] the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored properties . . . It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws [previously] upheld; the released time program for religious training; and the legislative prayers [also previously] upheld.

Lynch, 465 U.S. at 681-82 (citations omitted).

Federal funding through a facially neutral program which provides educational interpreters for the hearing impaired offers even less threat of secondary effects than those activities described in Lynch, or than other activities whose primary effects (and legislative purposes) this Court has upheld: equal use of veterans' benefits for religious higher education, equal access to public university facilities for religious groups, and judicial resolution of church property disputes through neutral principles. n5

n5 E.g., *Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986); Widmar v. Vincent, 454 U.S. 263 (1981); Jones v. Wolf, 443 U.S. 595 (1979).*

[*12]

As this Court held in *Mueller v. Allen, 463 U.S. 388 (1983),* when incidental aid to a parochial school is the result of a parental choice, the primary effect requirement is satisfied: "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval,' can be deemed to have been conferred on any particular religion, or on religion generally." *463 U.S. at 399* (citations omitted). This Court emphasized this point in *Hunt v. McNair, 413 U.S. 734 (1973):*

[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. . . . Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

413 U.S. at 742-43. As this Court noted in Widmar, the fact that religious speech may occur in a broad range of secular speech does not "commit the [school] to religious goals." *Widmar, 454 U.S. at 274.*

Accordingly, [*13] an incidental government benefit to religion through generalized educational funding cannot have the primary effect of endorsing religion. "Nothing in [this Court's] previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems." *Bowen v. Kendrick, 487 U.S. 589, 607 (1988).*

C. There is No Excessive Entanglement by the Provision of an Interpreter, and the Purposeful Exclusion of Parochial Schools From EHA Benefits Would Result in Excessive Entanglement by Showing Hostility to Religion

No excessive entanglement arises from funding an interpreter for James Zobrest or other hearing impaired students in parochial school settings. Also, a school "would risk greater entanglement by attempting to enforce its exclusion of . . . religious speech." *Widmar, 454 U.S. at 272 n.11.*

The same level of governmental interplay with private religious schooling has already been upheld by this Court, in *Board of Education v. Allen, 392 U.S. 236, 244-45 (1968),* n6 in *Mueller v. Allen, 463 U.S. 388, 403 (1983),* n7 and in other decisions. n8 A fortiori, [*14] the lesser involvement necessary for funding an interpreter for a deaf parochial school student does not produce impermissible entanglement. Moreover, a "real threat" of excessive entanglement must exist, rather than merely an imagined possibility. n9

n6 This decision upheld state textbook loans to religious school students.

n7 Mueller sustained state tax deductions and audits for religious school textbooks if secular texts and not if "instructional books and material used in the teaching of religious tenets." *463 U.S. at 390 n.1.*

n8 E.g., *Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).* Regan upheld state reimbursement of parochial teacher time in grading secular tests and keeping secular records. *Id. at 657-59.*

n9 *Marsh v. Chambers, 463 U.S. 783, 795 (1983).*

This Court has emphasized that being religious does not automatically disable an institution from receiving a benefit from the government. Further, simply being one religious recipient among many secular recipients does not constitute a threat of excessive entanglement. "Religious institutions need not be quarantined from public benefits [*15] that are neutrally available to all." *Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 746 (1976).* n10 In fact, this Court has upheld against a facial challenge "a statute that provides . . . benefits" "in a neutral fashion to religious and nonreligious applicants alike," and the Court has upheld the constitutionality of a specific benefit against an as applied challenged based solely on "the religious character of a specific recipient." *Bowen v. Kendrick, 487 U.S. at 551* (Kennedy, J., concurring).

n10 See also *Tilton v. Richardson, 403 U.S. 672, 676 (1971)* (providing construction grants to "all colleges and universities regardless of any affiliation with or sponsorship with a religious body"); *Hunt v. McNair, 413 U.S. 734, 741 (1973)* (approving certain benefits "available to all institutions of South Carolina, whether or not having a religious affiliation").

This Court has said it is "not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee for Pub. Educ. v. Regan, 444 U.S. at 660-61*. Interpreters for the deaf should [*16] consequently be presumed to relate curricular material acting as neutral conduits for information, rather than acting presumptively as envoys introducing religious doctrine. n11

n11 E.g., *Board of Educ. v. Allen, 392 U.S. at 245* ("this court has long recognized that religious schools pursue two goals, religious instruction and secular education.")

Banning this program shows hostility to religion in violation of the Establishment Clause. This case does not involve equal access issues. The same issues of excessive entanglement, however, apply when deaf students may have access to all other types of speech through an interpreter except religious speech. In Widmar this Court concluded, "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" *454 U.S. at 272, n.11*.

As this Court observed in *Zorach v. Clausen, 343 U.S. 306 (1952),* when allowing release-time for public school students to attend religious classes:

When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people [*17] and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14.

In *Board of Education v. Mergens, 496 U.S. 226 (1990),* this Court arrived at the same conclusion: that the purposeful exclusion of religious speech shows hostility to religion and is therefore in violation of the Establishment Clause. This Court stated this point twice:

Indeed, the message is one of neutrality rather than endorsement; if a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248.

Indeed, as the Court noted in Widmar, a denial of equal access to religious speech might create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Mergens, 496 U.S. at 253-54 (citations omitted).

Singling out religious speech for [*18] exclusion causes excessive entanglement in violation of the Establishment Clause: under that approach, governments need to monitor closely all speech to find the infrequent, but prohibited, religious speech. Rather than exhibiting such hostility, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987).* In the present case, the principle of benevolent neutrality means that James Zobrest's interpreter should be funded.

II. FUNDING SIGN LANGUAGE INTERPRETERS, INCLUDING FOR THE BENEFIT OF DEAF STUDENTS ATTENDING PRIVATE RELIGIOUS SCHOOLS, PROVIDES ONLY AN INCIDENTAL BENEFIT TO RELIGION AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Ninth Circuit erred by ruling that the government's provision of the deaf interpreter to a student attending a parochial school created an unconstitutional "symbolic union" between church and state. Petition Appendix at A-10. The proper constitutional focus in this case should be on the program as a whole, not one particular use of the aid. So analyzed, the [*19] program only incidentally aids religion and is therefore constitutional. The Ninth Circuit failed to heed this Court's words in *Bowen v. Kendrick, 487 U.S. 589 (1989),* when this Court said:

We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609.

This Court has ruled in a series of cases that governmental benefits neutrally available to all do not violate the Establishment Clause if religious groups are a portion of the recipients. This is only an incidental benefit to religion and is therefore constitutional. In *Widmar v. Vincent, 454 U.S. 264, 274 (1981),* this Court said:

But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement of religion."

Again, in *Committee for Public Education v. Nyquist, 413 U.S. at 771,* this Court said:

Not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religion is, for that reason alone, constitutionally invalid. [*20]

When a benefit flows from a neutral government program to a broad array of groups, including religious groups, this is a constitutional "incidental benefit to religion." In such instances, religious users are only one among many different recipients, and the criteria for receiving benefits has nothing to do with religion. This standard reflects what this Court has ruled in other cases concerning financial aid to religious groups in a series of recent cases. These cases are *Mueller v. Allen, 463 U.S. 388 (1983), Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986)* and *Bowen v. Kendrick, 487 U.S. 589 (1988).* n12

n12 This Court has also upheld laws that gave money to religious organizations when the government gave money to secular organizations for the same purposes. See, e.g., *Committee for Public Education v. Regan, 444 U.S. 646 (1980)* (New York statutory scheme reimbursing parochial schools for state-required testing and reporting is constitutional); *Wolman v. Walter, 433 U.S. 229 (1977)* (Ohio statute that provided secular textbooks, standardized testing, diagnostic services and remedial services to parochial school students is constitutional); *Hunt v. McNair, 413 U.S. 734 (1973)* (South Carolina revenue bond scheme to fund construction of buildings at a Baptist college is constitutional) *Tilton v. Richardson, 403 U.S. 672 (1971)* (federal program that funds construction of nonreligious buildings at religious colleges is constitutional); *Walz v. Tax Commission, 397 U.S. 664 (1970)* (tax exemptions available to all charitable nonprofit groups does not violate the Establishment Clause because religious groups are included in that class).

[*21]

In Mueller v. Allen, the first case of that trilogy, this Court said that benefits available to a wide variety of groups does not violate the Establishment Clause. This Court pointed to the important analogous legal principle of equal access from the free speech-open forum area of First Amendment law:

Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent, 454 U.S. 263 (1981),* where we concluded that the State's provision of a forum neutrally "available to a broad class of non-religious as well as religious speakers" does not "confer any imprimatur of state approval," ibid, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." Ibid.

463 U.S. at 397.

The Minnesota tax deduction upheld in Mueller v. Allen gives the model of a constitutional program -- one matched by the program here. Minnesota demonstrated a secular purpose for the tax deduction -- to help all parents defray the [*22] expenses amassed by sending their children to school. *463 U.S. at 395.* Minnesota granted a state income tax deduction for expenses incurred by parents sending their children to any school, public, private or parochial. Id. The tax deduction was not limited to private or parochial schools only. *463 U.S. at 398.* The tuition tax deduction was only one among many tax deductions available to Minnesota taxpayers. *463 U.S. at 396.*

In this case, the government's program provides a benefit to a broad class of people. The Education of the Handicapped Act, *20 U.S.C. § 1400* et seq., funds programs to aid all students who are handicapped. The parties have agreed that the program provides sign language interpreters, and that James Zobrest would be entitled to an interpreter if he attended either a public school or a non-religious private school. Cert Petition at A-4. Here the Mueller principle -- that a neutral government program that provides benefits to a broad range of recipients does not violate the Establishment Clause because some of the recipients are religious -- affirms the constitutionality of the funding requested [*23] by Petitioners. Interpreters would follow deaf students to private religious schools only because of the private choices made by individuals. In such situations, the program is constitutional because religious groups receive only incidental benefits. This is the clear ruling of Mueller v. Allen.

This case parallels this Court's decision in Witters. In Witters, Larry Witters qualified for a Washington state program that provided college aid for blind people who attended college. The state refused to give money to Larry to attend a Bible college where he wanted to study to be a pastor or youth leader. This Court reversed and ruled that the Establishment Clause did not prevent Larry Witters from receiving funding. This Court found (as in Mueller v. Allen) that the program had a secular purpose of aiding blind people in their educational pursuits *(474 U.S. at 495).* Also, religious colleges were only one among many different aid recipients of the program. *(474 U.S. at 488).*

This Court explained in Witters that government money that is paid to individuals or secular recipients may then choose to donate it to a religious group. This Court said:

It is [*24] well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

474 U.S. at 486-87.

The reason that these incidental benefits are constitutional is that religious groups receive the benefits only due to the independent and private choices of individuals. This Court in Mueller v. Allen said:

Where, as here, aid to parochial schools is available only as result of decisions of individual parents no "imprimatur of state approval," *Widmar, supra at 274,* can be deemed to have been conferred on any particular religion, or on religion generally.

463 U.S. at 399.

This Court reached essentially the same conclusion regarding funding of grantees under the Adolescent Family Life Act, *42 U.S.C. § 300z* et seq., (AFLA) in the case of *Bowen v. Kendrick, 487 U.S. 589 (1988).* [*25] In Bowen, the federal plan funded programs that would discourage teenage sexual activity outside of marriage. Included among the grant recipients were some religious groups. This Court ruled that AFLA was facially constitutional, even though religious groups received some grants. Because AFLA neutrally provided grants to a broad range of groups, the fact that incidental benefits to those religious groups participating in the plan did not lead to the conclusion that AFLA violated the Establishment Clause.

From Mueller, Witters and Bowen, a fundamental principle can be derived; that is, when a government creates a program in furtherance of a secular governmental purpose, and neutrally gives funds to various groups, including some religious groups, the program does not violate the Establishment Clause.

In this case, the Ninth Circuit failed to comprehend this fundamental principle and that court also misunderstood the Establishment Clause as selectively obliterating all religious users of broad-based governmental programs. Such a harsh, erroneously conceived approach violates the axiom that "religious institutions need not be quarantined from public benefits that are neutrally [*26] available to all." *Roemer v. Maryland Board of Public Works, 426 U.S. 736, 746 (1976).*

The Ninth Circuit avoided the clear principles about the constitutionality of programs that provide only incidental benefits to religious groups and instead argued from its understanding of *Grand Rapids School District v. Ball, 473 U.S. 373 (1985)* that funding James Zobrest's interpreter would create a "symbolic link" between church and state because a government interpreter would be translating speech in a parochial school.

"Symbolic union," whatever its merits as a constitutional principle, is not threatened by the neutral provision of interpreter services to assist in the education of profoundly deaf children. n13 Of course, the Ninth Circuit had to resort to the "symbolic union" notion because the government provides no funds to any religious body under EHA. Deaf students benefit from the provision of the interpreter, not the religious school.

n13 In such circumstances, "symbolic union" comes to mean, "I cannot put my finger on it, but it is something I do not like."

Grand Rapids, readily distinguishable from the present case, does not control the outcome [*27] of this case. Here, all deaf students can receive EHA aid, no matter what school they attend. In Grand Rapids, this Court struck down a program deliberately targeted to benefit parochial schools. Here, private religious schools are not the primary beneficiary of the Education of the Handicapped Act. Justice Powell stated the proper constitutional principle in his concurring opinion in Witters:

state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the Lemon v. Kurtzman test, because any aid to religion results from the private choices of individual beneficiaries.

474 U.S. at 490-91 (citation omitted).

More importantly, Witters stated that Grand Rapids v. Ball does not apply to cases like Zobrest. In Witters, this Court stated that the critical fact was whether "any aid provided under Washington's program . . . ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients." *474 U.S. at 487.* This Court added a footnote to that statement and said,

This is not the case described [*28] in Grand Rapids School District v. Ball, ("Where . . . no meaningful distinction can be made between aid to the student and aid to the school, 'the concept of a loan to individuals is a transparent fiction'"). . . .

474 U.S. at 487, n.4 (citations omitted).

The Ninth Circuit misapplied this Court's precedents and confused clear principles. In EHA, Congress established a program to aid in the educating of all handicapped students. Nothing in the legislation states anything about religion. The program is not a sham, a surreptitious funnel to secretly direct government money to religious groups. The program provides aid to any and all handicapped students.

Left unrebutted here, the Ninth Circuit's erroneous reasoning would lead to harsh results in a wide variety of otherwise innocuous programs. For example, a pastor on Medicaid would justifiably be denied a cornea transplant because the government-funded corneas would used to read religious materials and to write biblical exegeses. No principled basis exists to grant funding under Medicaid to a visually impaired minister and yet deny funding under EHA to an auditorially impaired student. The interpreter fills [*29] a mechanical function of merely translating spoken words into sign language. Judge Tang, in his dissent below, correctly said:

A sign language interpreter performs a mechanical service, changing words from one language into another. An interpreter neither adds to nor detracts from the message she conveys,nor does she interject personal views and philosophies into the translation. Unlike teachers and therapists, the sign language interpreter is a technical facilitator of communication, not a potential fount of religious doctrine.

Petition Appendix at A-25.

Such extreme results do not obtain when this Court's reasoning in Mueller, Witters, and Bowen is followed: if the government program has a secular purpose and is neutrally available to all who qualify for the program, then it is constitutional, even if some funds go to religious groups or individuals.

EHA neutrally grants aid to all handicapped students. There is no Establishment Clause violation to be found in funding James Zobrest's sign language interpreter, because at best, the funding provides only an incidental benefit to religion.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the [*30] Judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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